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8 BEFORE THE STATE OF CALIFORNIA
9 STATE WATER RESOURCES CONTROL BOARD
10

11 In re petition of
12 Beckman Capital Corporation,
13
14 Petitioner
15
16

PETITION NO: _____

**BECKMAN CAPITAL CORPORATION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR REVIEW OF REGIONAL
WATER QUALITY CONTROL BOARD
ORDER NO. R5-2004-0043**

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18 **I. INTRODUCTION AND SUMMARY OF CRITICAL FACTS**

19 On April 22, 2004, the Regional Water Quality Control Board, Central Valley Region
20 (Regional Water Board) issued Cleanup and Abatement Order No. R5-2004-0043 (Order),
21 concerning tetrachloroethene (PCE) contamination in the City of Lodi, California.¹ The Order
22 names Beckman Capital Corporation (Beckman) as a discharger, on the grounds that Beckman
23 owns property at 212 West Pine Street in the City of Lodi (the Property), which currently is
24 contaminated with PCE.² At no time did Beckman ever use PCE on its Property or within the
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27 ¹ The Order is attached to Beckman Capital Corporation's Petition for Review as Exhibit A.

28 ² Exhibit A, paragraph 6.

1 City of Lodi, let alone discharge or release PCE into the environment.³ No evidence that
2 Beckman caused any discharge of PCE was presented to the Board, and the only testimony on the
3 subject clearly states to the contrary.⁴ Accordingly, the Regional Water Board did not find that
4 Beckman itself discharged PCE at its Property or elsewhere, and instead named Beckman as a
5 discharger solely based on its status as the owner of a contaminated property.⁵

6 In contrast, the Regional Water Board determined that activities by Guild Cleaners, Inc.
7 (Guild), the Estate of Dwight Alquist (Estate), the City of Lodi (City), and the Lodi News
8 Sentinel (Lodi News), caused the PCE contamination in the area, including on Beckman's
9 Property.⁶ In other words, the Regional Water Board found, implicitly if not explicitly, that
10 Beckman's Property had been contaminated entirely by others. Accordingly, the Regional Board
11 named Guild, the Estate, the City, and the Lodi News as dischargers under the Order, each liable
12 for responding to its requirements.⁷

13 The record further indicates that of these parties, Guild is submitting Remedial
14 Investigation and Feasibility Study to the Regional Water Board for the Central Plume Area, has
15 already conducted a remedial investigation, including three pilot tests for remedial technologies,
16 and otherwise has performed what Regional Board staff concedes is "significant" work to date.⁸
17 In addition, the City has conducted investigations into the extent of the contamination in the area,

18 ³ See Exhibit A, paragraphs 1-6. See also Exhibit D to Beckman's Petition, the transcript of
19 the April 22, 2004 Regional Water Board hearing on the Order, pp. 11-12, 56-58.

20 ⁴ See Exhibit D generally, and in particular pp. 56-58. No one, including Board staff,
21 submitted any evidence indicating that Beckman itself used or caused PCE to discharge into the
22 environment. No such evidence exists, since Beckman is simply an investment company that
23 bought the Property in 1968, and its tenants used the building for general office purposes. See
24 Exhibit D, pp. 56-58; see also the letter from Scott Malm to Antonia Vorster, dated April 16,
25 2004, which the Board accepted as part of the record for its decision. A true and correct copy of
26 that letter is attached to the Petition as Exhibit H. The letter details the history of Beckman's
27 ownership and the fact that no PCE was used by Beckman or any of its tenants at the Property.
28 The letter also notes, in particular, that Beckman had no involvement in, or control over, the Lodi
News-Sentinel operations that preceded Beckman's occupancy of the Property. Rather, Beckman
purchased the Property in 1968 subject to the condition that it not take possession until the Lodi
News Sentinel vacated the Property, which it did several months after title was transferred to
Beckman.

⁵ See Exhibit A, ¶ 6; see also Exhibit D, pp. 11-12.

⁶ See Exhibit A, ¶¶ 1-5; see also Exhibit D, pp. 8-13.]

⁷ See Exhibit A.

⁸ See Exhibit D, hearing transcript, pp. 13-16, 19; see also Exhibit A, ¶ 11.

1 has acted to prevent its sewer lines from further spreading the contamination, and has clearly
2 expressed to the Regional Water Board its intent to pursue investigation and clean up in
3 cooperation with the Board and other parties.⁹

4 Despite the fact that Beckman has been victimized as much as any one by the
5 contamination, and was not responsible for it escaping into the environment in the first place,
6 Beckman did not dispute the Regional Water Board's authority to name Beckman as a discharger
7 in the Order based on its status as an owner of contaminated property. However, Beckman did
8 argue that under these circumstances, it should be named as a secondarily liable party.¹⁰ That
9 request was summarily denied by the Regional Water Board, which instead chose to place the
10 same burden on Beckman as on those actually responsible for the contamination.

11 **II. CONCISE STATEMENT OF CONTENTION**

12 Beckman contends that it was an abuse of discretion for the Regional Water Board to
13 deny its request to be named a secondarily liable party where the evidence in the record shows
14 that: (1) Beckman itself neither participated in any discharges of PCE into the environment nor
15 had involvement in or control over the operations that caused the contamination; (2) Beckman's
16 status as the owner of property contaminated by others, and nothing else, is what makes it subject
17 to an order under California Water Code §13304; and (3) other parties whose activities actually
18 caused the contamination continue to exist and some of them have already begun participating in
19 the investigation and cleanup in the area covered by the Order. Failure to name Beckman as a
20 secondarily liable party under these circumstances is inconsistent with the Orders of the State
21 Water Board, inconsistent with the manner in which other Regional Water Boards treat parties
22 situated similarly to Beckman, and inconsistent with State Water Board enforcement policy, and
23 consequently is abuse of discretion.

24 Accordingly, Beckman respectfully requests that the State Water Board invalidate the
25 portion of the Order naming Beckman as a primarily responsible party, and require the Regional
26 Water Board to instead name Beckman as a secondarily responsible party.

27 ⁹ See Exhibit A, ¶¶ 10, 12; see also Exhibit D, pp. 27-33.

28 ¹⁰ See Exhibit D, pp. 56-58.

1 **III. POINTS OF ERROR BY THE REGIONAL WATER BOARD**

2 **A. Failure to Designate Beckman as Secondarily Liable Is Inconsistent With Prior**
3 **Orders of The State Water Board**

4 1. *The Availability of Secondary Liability For An Owner Turns Primarily on*
5 *Lack of Involvement in Causing the Pollution and the Presence of Other*
6 *Dischargers Making Progress Towards Cleanup.*

7 In Aluminum Company of America, Order No. WQ 93-9, the State Water Board
8 concisely summed up the factors which should lead to holding a party secondarily liable in a
9 Cleanup and Abatement Order. Those factors are “whether or not the party initiated or
10 contributed to the discharge; and whether those parties who created or contributed to the
11 discharge are proceeding with cleanup.” Order No. WQ 93-9, p. 16, fn 8 (1993) (citing, among
12 others, Arthur Spitzer, Order No. 89-8 (1989)). Other decisions affirm that secondary liability is
13 appropriate for current landowners if they “neither caused nor permitted the activity which led to
14 the discharge.” Wenwest, Inc., et al, Order No. WQ 92-13, p. 9-10 (1992).

15 The facts in Spitzer (Order No. W.Q. 89-8), while somewhat complicated, are instructive
16 of the principles indicating when secondary liability is appropriate. The owners of the property at
17 issue gave a long term ground lease to T&F, Inc., which in turn sublet the property, over time, to
18 various dry cleaning operations. Subsequently, the owners and T&F negotiated a new ground
19 lease with another party, L.A. Land, which gave L.A. Land exclusive possession and control of
20 the property for 45 years. L.A. Land also received an assignment of all sub-leases. The ground
21 lease required L.A. Land to maintain the property in compliance with environmental laws, and
22 gave the owners a right of reversion if it failed to do so.

23 Shortly after signing the ground lease, L.A. Land terminated the dry cleaning operations
24 on the property. During subsequent redevelopment significant PCE contamination was
25 discovered in the soil and groundwater on the Property. The Regional Water Quality Control
26 Board, Santa Ana Region, named all of the owners, T&F, and the various dry cleaning operators
27 as dischargers in a Cleanup and Abatement Order. It chose not to name L.A. Land as a
28 discharger.

1 Upon petition for review of that order, the State Water Board added L.A. Land as a
2 discharger. The State Board found that “even though L.A. Land is not the fee owner, it did
3 acquire exclusive possession and control of the property. . . .” and that “during the 45 year term
4 of its lease, L.A. land has the same ability to control the continuing discharge on the Property as
5 it would have if it had fee title.” Id. at p.6. Importantly, the State Water Board stated:

6 “Although L.A. Land should be named as a discharger in the Orders, it should
7 have the same status as the Owners. *It should be required to take responsibility*
8 *for the cleanup only if the other dischargers fail to perform. This would be the*
9 *equitable conclusion, because L.A. Land had no connection with the activities*
10 *which initially caused the pollution, the parties directly responsible for the PCE*
11 *release have been identified and are making some progress towards cleanup, and*
12 *while L.A. Land has possession and control for a very long time, it shares that*
13 *control with the owners, who have reversionary rights to the Property.” Id. at p.7*
14 (emphasis added)

15 In short, the seminal factors in applying secondary responsibility are (1) whether the
16 discharger had no connection to the activities which caused the pollution; and (2) whether other
17 parties directly responsible for the pollution are making some progress towards cleanup. It is
18 critical to note that possession and control of the property, with concomitant ability to address the
19 ongoing migration of contaminants in the soil and groundwater, is grounds for being named a
20 discharger, but did not disqualify either L.A. Land (the current possessor) or the Owners (a
21 reversionary right to control) from being given secondarily liable status. It is also important to
22 note the State Water Board’s consideration of equity in determining secondary liability.

23 The order issued by the State Water Board in Wenwest, Inc., Order No. W.Q. 92-13
24 (1992), confirms these principles. There, both the landowner and the current tenant, which had
25 long term possession and control of the property, were named as dischargers by the Regional
26 Water Quality Control Board, San Francisco Bay Region. Neither of those parties had caused or
27 contributed to the contamination, which resulted from the operations of prior tenants that were
28 also named in the order. However, the Regional Board chose not to give the owner, Susan Rose,
29 or the current tenant, Wenwest, secondarily liable status.

30 The State Water Board corrected that determination, and required that both the tenant in
31 control, and the owner, be named as secondarily liable dischargers, responsible for carrying out
32 the order only if the other dischargers failed to do so. Id. at p.2. The State Board noted that

1 Wenwest “exercises all the normal attributes of day to day ownership of the property” and that it
2 “had nothing to do with the activity which caused the discharge.” *Id.* at p.4. However, it
3 concluded “we see no reason to treat Wenwest any differently from Susan Rose,” and designated
4 both of them as secondarily responsible parties.

5 2. *The Regional Water Board Fundamentally Misapplied the Standard For*
6 *Secondary Liability in Beckman's Case.*

7 The Regional Water Board never meaningfully addressed the factors identified above in
8 considering Beckman’s request, instead applying an erroneous misinterpretation of the principles
9 at issue. During the hearing, the Board inquired about when secondary liability should be
10 applied. Staff counsel indicated the following:

11 “And the circumstances that they have [applied secondary liability] are generally,
12 for example, a site where the owner leased a long term lease to somebody and was
13 never really involved in the operation of the property, and that owner may be
14 considered secondarily liable because they didn’t do the actual operation and they
weren’t participating in the property, but it is a very unique circumstance that you
would set up that kind of situation.”¹¹

15 That statement unequivocally mischaracterizes the standard, purpose and intent of
16 secondary liability as described in State Board orders. Those orders do not indicate that
17 secondary liability is reserved for owners who have given long term leases and are “never really
18 involved in the operation of the property” or who “weren’t participating in the property.” L.A.
19 Land, which was given secondary liability, clearly was “participating in the property” and
20 “involved in the operation” of the property, inasmuch as it was redeveloping it. Further, the
21 owner in Spitzer had a reversionary interest that permitted some control of the property.
22 Similarly, Wenwest was operating its franchise on the property. All of those parties were
23 designated as secondarily liable, because the operative principle is *lack of participation in the*
24 *contaminating activity* –not a complete lack of possession or control of the property, as board
25 members were led to believe.

26 The only other discussion of the standard for applying secondary liability occurred during
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28 ¹¹ See Exhibit D, pp. 39-40.

1 closing comments by staff. Members of the Regional Board inquired regarding staff's position
2 on secondary liability. In response, staff stated: "these dischargers who are requesting secondary
3 liability status don't fit within the requirements the State Board established for secondarily liable
4 parties."¹² That comment was based on "the reasons [staff counsel] discussed," (i.e. the long-
5 term lease comment quoted above), and on comments (made out of order) which indicated length
6 of ownership of the property, or current control over property with significant concentrations of
7 contamination, somehow disqualified a party from secondary liability.¹³

8 As is noted in the discussion above, control over a contaminated property, with
9 concomitant ability to remove source soils and address continued migration of contaminants, is
10 not a disqualifying factor with respect to being given secondary liability status. Moreover, length
11 of ownership is not considered as an important factor, if it is considered at all, by State Water
12 Board orders. In fact, other Regional Boards have given secondary liability status to owners that
13 did not themselves pollute, and who owned their properties as long as Beckman has owned the
14 Property here.¹⁴

15 In short, the Regional Water Board fundamentally misapplied State Water Board
16 precedent and principles when considering Beckman's contention that it should be secondarily
17 liable under the Order, and consequently has abused its discretion. Further, as is discussed
18 below, under the facts present here and the principles outlined in section A.1 above, Beckman
19 should have been designated as a secondarily liable party.

20 *3. The Facts Here Justify Designating Beckman as a Secondarily Liable Party,*
21 *and It Was An Abuse of Discretion For the Regional Board Not To Do So.*

22 The evidence presented and available to the Regional Water Board makes clear that there
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24 ¹² Exhibit D, pp. 65-66.

25 ¹³ Id. at pp. 58, 65-66.

26 ¹⁴ See Exhibit E to Beckman's petition, Order No. 00-112, issued by the Regional Water
27 Quality Control Board, San Francisco Bay Region. There, an owner that purchased his property
28 in 1971, and who did not itself pollute, subsequently was named as a discharger when it was
discovered that the prior owner had polluted the property. The current owner was given
secondary liability status in that order, notwithstanding the length of time it had owned the
property.

1 is no meaningful distinction between the owners or tenants-in-possession in Spitzer and
2 Wenwest, and Beckman. First, Beckman did not “initiate or contribute to the discharge.” All of
3 the testimony and evidence before the Regional Water Board indicates that Beckman itself did
4 not participate in or control any activity that caused PCE to be released into the environment, and
5 demonstrates that Beckman’s property was contaminated through the activities of others.
6 Beckman’s status as the owner of contaminated property, and nothing else, is what makes it
7 subject to an order under California Water Code §13304.

8 Second, the parties directly responsible for the PCE release have been identified and there
9 was ample evidence before the Regional Water Board that they are making some progress
10 towards cleanup. As noted above, one active discharger, Guild, has submitted an Remedial
11 Investigation and Feasibility Study work plan, has conducted remedial investigation work,
12 including three pilot tests for remedial technologies, and otherwise has performed what Board
13 staff conceded to be “significant” work to date.¹⁵ Likewise, the City has conducted investigations
14 into the extent of the contamination in the area, has acted to prevent its sewer lines from further
15 spreading the contamination, and has clearly expressed to the Regional Water Board its intent to
16 pursue investigation and clean up in cooperation with the Board and other parties.¹⁶

17 Third, where polluting parties are available to address the contamination, it is not
18 equitable to place on Beckman the heavy burden of having to respond to the Regional Water
19 Board Order in the first instance. Secondary liability is equitable and strikes the right balance, in
20 that Beckman is not given the same initial burden as the actual polluters, but remains named in
21 the order and available to address its obligations if the polluting parties prove unable to do so.

22 Under these circumstances, it was an abuse of discretion for the Regional Water Board to
23 refuse Beckman’s request to be designated secondarily liable under the Order, and Beckman
24 respectfully requests that the State Water Board correct that error by designating Beckman a
25 secondarily liable party.

27 ¹⁵ See Exhibit D, hearing transcript, pp. 13-16, 19; see also Exhibit A, ¶ 11.

28 ¹⁶ See Exhibit A, ¶¶ 10, 12; see also Exhibit D, pp. 27-33.

1 **B. Other Regional Water Boards Have Designated Parties Similarly Situated to**
2 **Beckman as Secondarily Liable, and the Failure to Treat Beckman in the Same**
3 **Manner Violates State Water Board Policy and Is Arbitrary and Capricious.**

4 Numerous other Regional Board orders have granted secondarily liable status to parties
5 similarly situated to Beckman. See, e.g. Exhibit E (property owner that did not pollute property
6 but who had current possession and ability to control designated secondarily liable); Exhibit F
7 (Trust that owned the property during a time of discharge, but did not itself cause the pollution,
8 and which continued to own the property at the time of the order, designated as secondarily
9 liable); and Exhibit G (Vallco, the owner of the property during a time of discharge, and the
10 current owner, which had no connection to the polluting activity, but which currently had control
11 and possession of the site, both designated as secondarily liable dischargers). Beckman should
12 be treated in the same way.

13 Adopted policy of the State Water Board is for the Regional Boards to “strive to be fair,
14 firm and consistent in taking enforcement actions throughout the State” and to “apply similar
15 requirements to similar situations.”¹⁷ [.] The Regional Water Board Order naming Beckman as a
16 primarily liable party violates these principles.

17 First, it is not fair, in that it treats property owners having no connection to the pollution
18 (other than the fact of owning a property polluted by others), as equally culpable with those that
19 caused the pollution in the first place. It also places equal cleanup burdens on both, despite
20 ample evidence and basis to distinguish between the two.

21 Second, it is not consistent and does not constitute “applying similar requirements in
22 similar situations” when other parties, similarly situated, are named as secondarily liable parties
23 by other Regional Water Quality Control Boards, but Beckman is not. There is no meaningful
24 distinction between Beckman and those other parties, yet if the Regional Water Board Order is
25 allowed to stand as it exists, Beckman will be responsible, in the first instance, for meeting the
26 requirements of a CAO, while those other parties are not.

27 ¹⁷ See State Water Resources Control Board Resolution no. 2002-0040 (Water Quality
28 Enforcement Policy), pp. 1-2.

1 In short, the Regional Water Board decision naming Beckman as primarily liable is
2 inconsistent with the adopted policy of the State Water Board, as well as the orders of other
3 Regional Water Quality Control Boards, and therefore is arbitrary and capricious.

4 **IV. CONCLUSION**

5 For all of the foregoing reasons, Beckman respectfully requests that the State Water
6 Board: (1) stay the Order as to Beckman; (2) invalidate the portion of the Order naming Beckman
7 as a primarily responsible party; and (3) require the Regional Water Board to instead name
8 Beckman as a secondarily responsible party.

9 DATED: May 21, 2004

SEDGWICK, DETERT, MORAN & ARNOLD LLP

11
12 By:  _____

13 Brett H. Bailey

14 Attorneys for

Beckman Capital Corporation